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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

LENNI WILKES,

Defendant and Appellant.

C061292

(Super. Ct. No.
08F4137)

A jury found defendant Lenni Wilkes guilty of assault with a deadly weapon and making criminal threats. The trial court sustained allegations that defendant had prior convictions within the meaning of Penal Code section 667, subdivision (d) after defendant waived his right to a jury trial. At the sentencing hearing, the court declined an invitation to exercise its discretion under Penal Code section 1385 to strike either of the prior convictions for three strikes purposes, stating that "I think this isn't even a close case" It sentenced defendant to state prison.

Defendant contends the trial court committed an abuse of discretion in declining to strike either prior. We shall affirm.

The circumstances of the offenses form part of the analysis of defendant's argument. We therefore will incorporate them in the Discussion rather than relate them separately.

DISCUSSION

A court may exercise its discretion under Penal Code section 1385 to strike an allegation or finding that a prior conviction comes within the meaning of Penal Code section 667, subdivision (d) if, *and only if*, a defendant can be "deemed outside the . . . spirit" of the statute, without any consideration of "extrinsic" factors such as court congestion or antipathy to the sentencing consequences for the defendant, and giving "preponderant weight" to factors inherent in the statute such as the nature and circumstances of the present and previous felony convictions, and the defendant's own background, character, and prospects. (*People v. Williams* (1998) 17 Cal.4th 148, 161.) We therefore turn to the evidence in the record on these criteria.

A. Circumstances of present and prior convictions

In May 2008 defendant, the victim, and another neighbor were friends who had been drinking heavily. The neighbor and the victim got into a dispute over what the neighbor felt was inappropriate behavior on the part of the victim toward a teenaged girl (who was yet another neighbor). Defendant stepped between them and told the victim to back off, punching him in the chest. The victim punched defendant's face in response, knocking out a tooth. The brawl moved into the kitchen, where defendant grabbed a knife. In attempting to disarm defendant,

the neighbor grabbed at the knife and cut open his hand. Defendant inflicted wounds on the victim's arms and hands. Defendant threatened to kill the victim, who fled out the front door with defendant in pursuit. Defendant returned to the apartment and the police contacted the victim. The victim's wounds required stitches. After the incident, defendant sent the neighbor a letter via a relative in which he asked the neighbor to present a false version of the facts at trial that would favor him. He also promised to do anything for the victim, even buying drugs for him, if he agreed not to testify.

In his abbreviated submission to the court, defendant asserted that his 1986 conviction for child molestation was remote and must not have been an egregious offense, because the court in granting probation agreed to reduce it to a misdemeanor on successful completion of probation (which defendant did not accomplish).¹ Defendant also asserted that the 1996 robbery conviction stemmed from his efforts to collect a debt from the victim.

According to the probation report, defendant violated probation in 1988, 1991, and 1992, at which point the court revoked probation and sent him to prison. In late 1993 he had a conviction for driving under the influence, and had parole violations in 1995 and 1996. He committed the robbery later in

¹ At the sentencing hearing, defense counsel represented that the 1986 crime did not involve "actual sex" and "that it was some sort of a touchy-feelly [*sic*] type thing."

1996, for which he incurred a nine-year prison term. He violated parole in 2004 and 2006.

B. Defendant's background, character, and prospects

Defendant expressed his remorse to the probation officer for what he had done, claiming he had never hurt anyone before and had only intended to stop a fight between the victim and the neighbor. He now asserted that his behavior had occurred during an alcohol blackout. In his court submission, he emphasized the absence of any history of violent offenses, his employment record, his responsibility for an infirm mother and a niece, and his "strong desire" to be a law-abiding citizen.

The probation officer noted that defendant had worked sporadically as a welder as jobs were available, but had been unemployed since 2007. He had obtained a GED after dropping out of high school to help support his family. Defendant denied using drugs or abusing alcohol.

C. Analysis

The burden is on defendant to demonstrate that the trial court's decision was irrational or arbitrary, rather than merely being one of alternative reasonable readings of the facts before the court. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) Defendant has failed to meet that burden.

Defendant focused only on the remoteness of the 1986 conviction at sentencing and reiterates this point on appeal (along with his claim that it was not an extreme version of the crime and the absence of subsequent similar behavior). He also believes the robbery was remote without any intervening

instances of violence or increasingly serious conduct. He suggests it was the court's responsibility to inquire further into the nature of the prior convictions. Finally, he minimizes the nature of the present convictions as reflecting "nothing more than a drunken quarrel in which all the participants sustained injuries."²

Defendant has not demonstrated such a law-abiding character in the intervening years that he is not among the sort of recidivists at whom the Legislature and the electorate have aimed with these sentencing provisions. For 22 years defendant has had opportunities to lead a law-abiding life and has failed to live up to his promises. It is immaterial that his transgressions have not been violent. Society, through the trial court, is not compelled to define deviancy downward and excuse the flouting of more minor mandates, such as compliance with the conditions of probation and parole. His iterated refusal to conform his behavior to social strictures, even in the face of enhanced sentencing, merits a greater punishment for the present offense.³ Nor does the fact that the present offense

² Defendant—in the midst of his discussion of the criteria relevant to striking a recidivist finding—advertises to the distinct subject of his sentence being cruel and/or unusual punishment. (*People v. Cole* (2001) 88 Cal.App.4th 850, 868–869.) This is an impermissible "lurking" argument, as it is not clearly presented as required in any heading of the opening brief, which relieves us of the obligation to respond (*Imagistics Internat., Inc. v. Department of General Services* (2007) 150 Cal.App.4th 581, 593, fn. 10), as does the perfunctory assertion of the issue (*id.* at p. 592, fn. 8).

³ For this reason, even if the trial court had undertaken a

involved a drunken quarrel in any manner minimize its nature. To the contrary, it displays the threat that defendant, who denies any problem with alcohol, presents of further unexpected eruptions of violence when drunk. Finally, defendant's efforts to present false testimony and prevent a witness from testifying do not evince a law-abiding mindset willing to accept the consequences of his actions.

While it is possible that some jurists might reasonably have decided to strike one of the findings, we cannot say that it was *unreasonable* for the trial court to come to the contrary conclusion. (Compare *People v. Cluff* (2001) 87 Cal.App.4th 991, 994, 1004 [suggesting failure to strike recidivist finding would be an abuse of discretion where present offense is only a technical failure to update offender registration with duplicative data].) We therefore reject his claim.

DISPOSITION

The judgment is affirmed.

We concur: RAYE, J.

SIMS, Acting P. J.

CANTIL-SAKAUYE, J.

sua sponte inquiry into the nature of his prior convictions (a duty for which he does not provide any authority), it is not of any moment that they might have been only minimal versions of the two offenses. They are part and parcel of his inability to comply with the law.